BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUAN HERNANDEZ	)	
Claimant	)	
	)	
VS.	)	
	)	
WASTE MANAGEMENT OF KANSAS, INC.	)	
Respondent	)	Docket No. 1,044,410
	)	
AND	)	
INDEMNITY INS. CO. OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the May 4, 2009 Order Denying Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that although the claimant suffered an accidental injury arising out of and in the course of his employment with respondent, claimant failed to give notice within 10 days and just cause was not established for his delay. The ALJ went on to find that written notice was provided February 20, 1999[1] [sic] and that claimant could not cite a precise date of accident. As a result of these findings, the ALJ denied claimant's request for medical treatment.

Claimant requests review arguing that the Board should reverse the ALJ and order respondent to provide medical treatment. First, claimant maintains he suffered an accident in November 2008, but he consciously failed to tell his employer as he was afraid he would lose his job. Thus, he argues there is just cause for his failure to notify his employer of his initial injury. Second, claimant maintains that after the initial accident in November 2008, he continued to injure his right shoulder each and every working day thereafter until February 6, 2009, when he was terminated. Claimant believes the appropriate date of

[1] The date in the Order should be 2009 not 1999.

accident is February 20, 2009, the date he filed his Application for Hearing and notice was provided to respondent. Accordingly, he believes his notice to respondent was timely and he is therefore entitled to benefits under the Act.

Respondent argues that this claim should be dismissed with prejudice as the claimant has failed to establish the threshold requirement of timely notice in accordance with K.S.A. 44-520, and also because the claimant has failed to sustain his burden of proof that he suffered an accidental injury on the job.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a trash truck driver/loader. He was required to drive a route, stop the truck, load the trash into the back and proceed to the next stop. Claimant testified that in early November, 2008 he injured his right shoulder while lifting a trash container. He admits that he purposely decided *not* to tell his employer of this accident because he had already had two incidents at work that involved property damage. According to claimant, he was on probation as a result of these earlier events and was concerned that he would be fired if he reported an accident.

Claimant continued to work and testified that his shoulder began to hurt worse over time, which he attributes to repetitively lifting the containers of trash into the back of his truck. On February 6, 2009, claimant was laid off apparently due to the economy. Shortly thereafter he went to see an attorney and on February 20, 2009 he filed an Application for Hearing alleging a series of accidents ending on February 6, 2009 as a result of his work for respondent. Respondent does not dispute that written notice was made on February 20, 2009.

He has seen one physician, at his attorney's request, and the uncontroverted evidence is that he requires treatment for his right shoulder complaints. Dr. Richard Rattay examined claimant on March 4, 2009 and diagnosed a possible rotator cuff tear along with impingement syndrome and recommended an MRI.

At the preliminary hearing, claimant testified that he initially hurt his shoulder sometime in November 2008. He was unable to identify a date of his accident. Claimant further testified that although he was aware he injured his shoulder, he purposely decided not to tell his employer. In fact, claimant admits that he made no reference to an injury to his employer until after he was laid off on February 6, 2009. According to claimant, he was being watched closely due to two separate property damage accidents and he feared losing his job. Dr. Rattay's records reflect a history of an accident 4 months earlier which would coincide with claimant's assertion of an accident in November 2008.

The ALJ concluded that although claimant suffered an accidental injury that arose out of and in the course of his employment, "[c]laimant could not cite a date of accident and did not provide a notice of accident. Written notice was provided 2/20/99 [sic]."[2] Benefits were therefore denied. This finding seems to presuppose that a single acute injury occurred and does not address the issue of a series if accidents, as alleged in the Application for Hearing.

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The statute provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.

(2) Whether the employee is aware he or she has sustained an accident or an injury on the job.

(3) The nature and history of claimant's symptoms.

(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

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[2] ALJ Order (May 4, 2009).

Claimant contends that while he was very aware he sustained an injury and he apparently knew he should advise his employer, he did not give notice of his accident as he feared the loss of his job and that fear provides just cause for his failure to notify respondent. There is no indication within the record if there are any sort of postings in the work place regarding the requirement to notify an employer about accidents.

Although claimant is unable to identify a precise date of injury, that ambiguity is irrelevant under these facts. Claimant testified he injured his shoulder in early November 2008. No date was specified but that general time frame is corroborated by Dr. Rattay's records, although admittedly this recitation is based solely on claimant's input. Claimant's first notice of his injury came on February 20, 2009. Whether there is just cause or not, the February 20, 2009 notice is outside either time frame provided for in the statute even if one assumes claimant's acute injury occurred on the last day of November, 2008. Thus, that portion of the ALJ's Order that denies claimant's claim for lack of timely notice *for a single acute injury in November 2008* is affirmed.

However, the ALJ's Order failed to take into account the allegation that claimant suffered a series of repetitive injuries, ending on his last date of work, an allegation that is uncontroverted by the evidence in the record. In order to determine the timeliness of claimant's notice for purposes of a repetitive injury, the Court must consider the date of accident.

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date**

> **of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[3] (Emphasis added.)

In this instance, claimant alleges and testified to a series of injuries following his initial acute injury. His testimony is clear that he suffered a distinct injury sometime in November 2008. But, he alleges he continued to injure his shoulder each and every day he was working, lifting the trash and placing it in to the back of his trash truck.

Based upon the statute above and the evidence contained in the record, claimant's legal date of accident is February 20, 2009, the same date he gave written notice to his employer. Thus, his notice to the respondent was timely *as it relates to a claim for repetitive injuries*. Accordingly, that portion of the ALJ's Order is reversed and remanded to the ALJ for further proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[4] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 4, 2009, is affirmed in part, reversed in part, and remanded for further proceedings.

IT IS SO ORDERED.

Dated this _____ day of July 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant
Patrick M. Salsbury, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[3] K.S.A. 2005 Supp. 44-508(d).

[4] K.S.A. 44-534a.